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No. 89-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GASTON COUNTY BOARD OF EDUCATION, THE STATE OF NORTH CAROLINA, AND THE NORTH CAROLINA STATE BOARD OF EDUCATION,
Petitioners,

vs.

KAREN LEIGH SHOOK, by and through her guardian ad litem, WENDY SHOOK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE FOURTH CIRCUIT ERRED IN TOLLING THE STATE STATUTE OF LIMITATIONS APPLICABLE TO RESPONDENT MS. SHOOK'S CLAIM, WHEN SUCH TOLLING WAS INCONSISTENT WITH THE EXPRESS POLICY OF THE FEDERAL ACT UNDER WHICH THE CLAIM WAS BROUGHT?

II. WHETHER THE FOURTH CIRCUIT ERRED IN FINDING MS. SHOOK HAD STANDING TO BRING THIS ACTION?

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vs.

KAREN LEIGH SHOOK, by and through her guardian ad litem, WENDY SHOOK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, The Gaston County Board of Education, The State of North Carolina, and The North Carolina State Board of Education, petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on August 15, 1989.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals is reported at 882 F.2d 119. It is reprinted in the appendix to this petition at Appendix A at 1A-8A.

The opinion of the United States District Court for the Western District of North Carolina which the Court of Appeals af-

firmed in part, vacated in part, and remanded is unreported and is reprinted in the appendix to this petition at Appendix B at 9A-12A. The judgment of the District Court allowing Petitioner's motion for summary judgment is unreported and is reprinted in the appendix to this petition at Appendix C at 13A. The order of the District Court denying a Motion to Amend or Alter the Judgment is unreported and is reprinted in the appendix to this petition at Appendix D at 14A.

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

20 U.S.C. § 1415(a)-(e) provides:

Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures: hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to -

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change.,

the identification, evaluation, or educational placement of the child or the provisions of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or

educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of 1417 (c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

North Carolina General Statute § 1-17 provides in pertinent part:

§ 1-17. Disabilities.

(a) A person entitled to commence an action who is at the time the cause of action accrued either

(1) Within the age of 18 years;

(2) Insane; or

(3) Incompetent as defined in G.S. 35A-1101(7) or (8) may bring his action within the time herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter.

For those persons under a disability on January 1, 1976, as a result of being imprisoned on a criminal charge, or in execution under sentence for a criminal offense, the statute of limitations shall commence to run and no longer be tolled from January 1, 1976.

North Carolina General Statute § 1-52 provides in pertinent part:

§ 1-52. Three years.

Within three years an action -

(1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1).

(2) Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it.

STATEMENT OF THE CASE

Respondent, Karen L. Shook, a multi-handicapped child, was placed in a self-contained class for the emotionally disturbed in the Gaston County Schools from October 1976 until the summer of 1979. The parents of Ms. Shook then withdrew her from the Gaston County School system and on February 20, 1980, enrolled her in the San Marcos Treatment Center of The Brown Schools in Austin, Texas.

Thereafter, the parents retained an attorney who, in the summer of 1981, requested that the Gaston County Board of Education (the "County Board") provide their daughter with a free appropriate education for the 1981-82 school year pursuant to the Education of the Handicapped Act ("EHA" or "the Act"), 20 U.S.C. § 1400, *et seq.* (1978 and supp. 1988). In response to this request, the County Board sent an evaluation team to The Brown Schools to determine the appropriateness of Ms. Shook's placement there. On December 9, 1981, the County Board's Administrative Placement Committee ("APC") met to discuss the appropriate educational placement of Ms. Shook. The parents attended this meeting.

The APC found The Brown Schools to be an inappropriate placement and so notified the parents by letter dated December 11, 1981. The APC recommended that Ms. Shook be placed at a North Carolina educational center. The letter further informed the parents of their right to appeal this decision. The parents did appeal. Due to two postponements at the request of the Shook's attorney and a third

indefinite postponement to allow settlement discussions, however, the appeal was not pursued and no decision ever made.

Counsel for both parties corresponded concerning Ms. Shook's appropriate educational placement and the APC's decision until August of 1982. The County Board and its counsel received no further communications from Ms. Shook, her parents or attorneys until 1986, when a demand for reimbursement was made by Ms. Shook's newly retained attorney. The reimbursement demand was refused. On December 8, 1986, Ms. Shook, by and through her guardian ad litem, filed this action against the County Board for reimbursement of education expenses pursuant to the EHA and ***Burlington School Committee v. Department of Education***, 471 U.S. 359 (1985). The State of North Carolina and The North Carolina State Board of Education were joined as third party defendants on June 3, 1987.

On August 17, 1987, the District Court allowed the County Board's motion for summary judgment. The Court found that the applicable three year statute of limitations for actions upon a liability created by a statute, either federal or state, was tolled as to Ms. Shook and therefore the action was timely filed. N.C. Gen. Stat. § 1-52(2) (1983); N.C. Gen. Stat. § 1-17(a) (1987). However, the Court further held that Ms. Shook lacked standing because she had suffered no injury. Expenses for The Brown Schools were paid for with proceeds of the insurance policy of her father and while the parents might once have had an action for reimbursement, Karen Shook did not. Appendix B at p. 9A. Ms. Shook's subsequent motion to alter or amend this judgment was denied. Appendix C at p. 13A.

On August 15, 1989, the Court of Appeals affirmed the District Court finding that Ms. Shook's action was timely filed and reversed as to standing. The depletion of the insurance policy benefits was deemed a "financial interest of [Ms. Shook], and she, thus, had standing under Article 3 of the Constitution to prosecute her claim under the EHA." Appendix A at p. 1A. Accordingly, the case was remanded for trial.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT IMPROPERLY TOLLED THE STATUTE OF LIMITATIONS AS TO MS. SHOOK'S CLAIM, DIRECTLY CONTRADICTING A NINTH CIRCUIT DECISION AND IGNORING THE SUPREME COURT MANDATE THAT STATE TOLLING RULES WHICH ARE INCONSISTENT WITH THE POLICY BASIS OF A FEDERAL ACT ARE NOT TO BE APPLIED TO CLAIMS BROUGHT UNDER THAT ACT.

Where a federal court properly borrows a state statute of limitation, it also uses that state's rule for tolling the statute of limitation unless application of the state rule would be "inconsistent with the federal policy underlying the cause of action under consideration." ***Board of Regents v. Tomanio***, 446 U.S. 478, 485 (1980) (quoting ***Johnson v. Railway Express Agency,*** 421 U.S. 454 at 465 (1975)). The Court of Appeals ignored the precedent of ***Board of Regents*** and ***Johnson*** and held that the statute of limitations was tolled by Ms. Shook's infancy and incompetency. The policy behind the EHA was not even discussed by the Court in its decision.

The Fourth Circuit's decision is directly contrary to that of the Ninth Circuit in ***Alexopulos v. San Francisco Unified School District,*** 817 F. 2d 551 (9th Cir. 1987). Appendix A at 1A.

In ***Alexopulos***, a handicapped child's claim against a local school board was brought years after the alleged injury occurred by invoking the state's tolling provisions. The Ninth Circuit, following the ***Board of Regents*** and ***Johnson*** mandate, examined the policy underlying the EHA and found that Congress clearly intended that a speedy determination be made as to whether a child is receiving a free appropriate education. *Id.* at 556. The Ninth Circuit held that to permit the parents of a handicapped child to circumvent the statute of limitations by invoking its tolling provisions to bring a claim in

the child's name, years after the alleged wrongdoing, undercuts this policy. *Id.*

Congress' desire that a timely and appropriate education be provided for handicapped children is evidenced in the substantial substantive and procedural rights conferred on the parents or designated guardians of such children by the EHA. 20 U.S.C. § 1415(a)-(e). These procedural rights are conferred in order that an immediate determination can be made as to the child's rights under the Act. 20 U.S.C. § 1415(b)(1)(A), (c)-(E), (2) and (c). For example, when there is no identifiable parent or guardian, the local public agency must assign a surrogate parent to pursue the child's rights. 20 U.S.C. § 1415(b)(1)(B). Parents or designated guardians must be given written notice whenever the agency proposes to make a decision affecting the child's educational placement. 20 U.S.C. § 1415(b)(1)(C). Furthermore, the Act grants the parents or designated guardians a private right of action and a hearing.

By providing these considerable procedural protections, Congress has evidenced its intention that children protected by the Act not be forced to await majority or the removal of their particular disability before asserting and determining their rights under the Act. Instead, Congress desired the prompt resolution of conflicts surrounding the provision of a free appropriate education for all handicapped children, as is apparent throughout the EHA. The Fourth Circuit Court of Appeals has erred by not recognizing, as the Ninth Circuit did in ***Alexopulos***, that Congress "did not intend to authorize [the] filing of claims on behalf of or by the children many years after the alleged wrongdoing occurred." ***Alexopulos***, 817 F. 2d at 556.

In ***Burlington School Committee v. Department of Education***, 471 U. S. 359 (1985), this Court determined that relief available under § 1415(e)(2) of the EHA includes reimbursement for funds expended on private tuition for a handicapped child, under certain specified circumstances. In ***Burlington***, the reimbursement remedy was explicitly given by this Court to the parents rather than

to the child. *Id.* at 372. The ***Burlington*** court, in analyzing the remedies contemplated by Congress when enacting the EHA, said "by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to **parents** as an available remedy in a proper case." *Id.* (emphasis added). The subsequent grant in Burlington was to the parents, evidencing an intent consistent with the intent of Congress, not to exclude the child but to insure that the representative of the child's rights has the power to act in an expedient fashion. In the instant case, the parents made several demands on the County Board for reimbursement which were denied. The parents subsequently abandoned the claim and after expiration of the statute of limitations on that claim, are asserting it through their daughter. Certainly, this Court could not have intended that remedy be used by the parents of a handicapped child to prolong rather than expedite the resolution of conflicts regarding provision of a free appropriate education for that child.

The Fourth Circuit's holding permits Ms. Shook to challenge, years later, a decision which her parents knowingly and deliberately left unchallenged at the time of its making. The result is contrary to the express policy underlying the EHA and in conflict with the decisions of this Court. Consequently, The County Board respectfully asks the Court to intervene to rectify the confusion regarding the proper interpretation of the policy underlying the EHA and the correct application of ***Board of Regents*** and ***Johnson*** in light of this policy.

II. THE FOURTH CIRCUIT ERRED IN FINDING MS. SHOOK HAD STANDING.

The ***Burlington*** court, in construing § 1415(e)(2) of the EHA, created the right to reimbursement in parents for expenditures on their child's education. ***Burlington***, 471 U.S. at 369. Therefore, the Fourth Circuit erred in finding Ms. Shook had standing based upon her interest in the benefits of her father's insurance policy.

The reasons this holding was in error are two-fold. Firstly, Ms. Shook is not a **parent** and Congress did not intend to confer standing to sue under the EHA to a handicapped child when that child was represented by parents or a guardian who raised the issue at the time an alleged violation of the EHA occurred. Parents may bring an action under the EHA on behalf of their children as well as on their own behalf. ***Alexopulos***, 817 F.2d at 556. To allow the child a second opportunity years later hampers the goal of Congress to ensure speedy resolution of matters regarding the educational program of a handicapped child. *Id.* at 556.

Secondly, the Fourth Circuit found that Ms. Shook suffered a financial injury upon depletion of her father's health insurance policy. The policy was for the treatment of mental and nervous disorders only and provided no coverage for educational expenses. Depletion of such a policy to pay expenses at a twenty-four hour, total care facility does not allow for even a fair inference that the proceeds were spent for educational purposes for which the County Board could be even potentially liable.

III. THE DECISION BELOW WILL RESULT IN SERIOUS, RECURRING PROBLEMS FOR PUBLIC SCHOOL SYSTEMS ATTEMPTING TO SERVE CHILDREN PROTECTED BY THE EHA BY ALLOWING CLAIMS TO BE BROUGHT MANY YEARS AFTER THE ALLEGED INJURY OCCURRED.

The decision of the Fourth Circuit not only undermines an important policy of the EHA, but denies any finality to the decisions of schools applying the Act. This has serious implications for public school systems.

In the instant case, the parents contested the initial placement decision by the local school authorities and pursued certain administrative remedies. They retained legal representation and

consequently made the informed decision not to bring a challenge in court. Despite the earlier abandonment of their claim, the parents are being allowed a second opportunity, years after receiving written notification of the APC's decision, to bring suit in the name of their child and to contest that decision.

This practice, if left unchecked, will subject local school systems to lawsuits for decisions made regarding the appropriate educational placement for a handicapped child for as many years as an applicable state tolling rule permits. A school board will have no means of protecting itself from suits brought in the child's name numerous years after the parents acceded to its decision concerning that child's educational placement.

Even if some precautionary measures were conceivable, their implementation would be so time-consuming and costly as to negatively impact upon the entire educational system. Furthermore, the process of selecting an appropriate educational placement for the handicapped child under the EHA will become so complicated and arduous as to ultimately harm the class the Act was designed to protect -- handicapped children. As Senator Williams emphasized during floor debate prior to enactment of the EHA: "Delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development .... In view of the urgent need for prompt resolution of questions involving [... education] it is to be expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable." ***Alexopulos,*** 817 F.2d at 556 (quoting 121 Cong. Rec. 37, 416 (1975)).

The County Board contends that decisions and educational plans of public school systems, deliberately and knowingly left unchallenged by the child's parents at the time, should not remain viable for litigating years later.

CONCLUSION

For the foregoing reasons, the County Board respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted, this the 9th day of November 1989

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT upon the attorney of record by placing same in the United States Mail, first class postage prepaid, addressed as follows:

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This the 9th day of November, 1989.

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Gaston County Board of Education

APPENDICES A - D

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-3893

Karen Leigh Shook, by and through her guardian ad litem, Wendy Shook,
Plaintiff-Appellant,

vs.

Gaston County Board of Education,
Defendant-Appellee,

vs.

State of North Carolina; The North Carolina State Board of Education,
Third Party Defendants-Appellees

Judgment Entered August 15, 1989

Before WIDENER, Circuit Judge, BUTZNER, Senior Circuit Judge, and HENDERSON, District Judge for the District of South Carolina, sitting by designation.

WIDENER, Circuit Judge:

Karen L. Shook, by her guardian ad litem, appeals the grant of summary judgment in favor of the Gaston County Board of Education. The district court found that although the statute of limitations did not bar her claim, she lacked requisite standing. We are of opinion that the plaintiff has timely filed and further that she has standing to pursue her cause of action. We affirm in part and vacate and remand this case to the district court for further proceedings.

Karen, a mentally handicapped woman, brought this action, seeking reimbursement of education expenses pursuant to the Education of the Handicapped Act (E.H.A., 20 U.S.C. § 1400 et seq.) In October of 1976, Karen began attending public schools operated by the defendant in Gaston County. Due to psychological difficulties, Karen's doctors recommended, in January 1980, that she be placed in a private educational institution in Austin, Texas. On February 20, 1980, Karen was enrolled at the Brown Schools which provided a program of special education and related services, including a therapeutic residential setting. She attended the Brown Schools until the conclusion of the 1981-82 school year.

The Gaston County Administrative Placement Committee, an agency of the Gaston County Board of Education, in the meantime, held a meeting which Karen's parents attended on December 9, 1981 concerning Karen's placement pursuant to the E.H.A. By letter dated two days after the meeting, the Shooks were notified that the Placement Committee recommended that Karen be placed at Western Carolina Center. The letter further informed the Shooks of their right to appeal the decision.

The Shooks retained counsel, who was informed by counsel for the Board of Education that there would be no reimbursement by the Board for Karen's attendance at the Brown Schools. While at the Brown Schools, Karen's education was paid for by her parents' private funds as well as by insurance payments, mentioned later. The insurance in question is a group health insurance policy issued by Pilot Life Insurance Company in consideration of Shook's employment for the benefit of himself and his dependents. We also note that, although Karen is an adult, she is still eligible to receive funds for special therapeutic services under the terms of the policy because she continues to be disabled by reason of mental retardation.

The policy, as issued by Pilot Life, was in what we presume to be a more or less standard form. But, at the time of Shook's

employment, the policy provisions with respect to mental and nervous disorders were changed so that Shook's policy was different from that of other employees. Shook's employer, Tultex Corporation, in the words of its Vice President for Personnel, "provided a special self-insurance plan for the direct benefit of Karen Leigh Shook, individually, to provide an available maximum lifetime benefit for special therapeutic services relating to mental and nervous disorders in the amount of $100,000." This change in coverage was made in the form of a letter from Tultex to Shook, which included the following language: "Tultex has elected to make an administrative change in your policy to provide the following coverage for your daughter, Karen: (1) increase to $100,000 the maximum lifetime benefit for treatment of mental and nervous disorders." So, as a result of the policy change, the coverage with respect to Karen's mental and nervous disorders was in favor of her by name rather than merely as a beneficiary as a result of being a dependent of Shook, and Tultex became obligated to perform the contractual obligation.

Karen reached age eighteen on February 9, 1984. A legal guardian was appointed in July of the same year, and her guardian ad litem filed this suit against the Board in 1986, seeking reimbursement for the depletion of her health insurance benefits used to pay for her education. Her parents had not previously pursued the claim in court. The district court agreed with Karen that the statute of limitations had been tolled due to her minority and incompetency, yet granted summary judgment in favor of Gaston County, finding that Karen lacked standing as it was her parents, not Karen, who had sustained the injury. Karen appeals.[1]

The district court, in its Memorandum and Order, outlined the framework of the E.H.A. The E.H.A. provides public school districts

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1 The Board has filed no cross appeal, but argues that the judgment of the district court should be affirmed, even though there may be standing, because the statute of limitations had run. See *S.E.C. v. Chenery*, 318 U.S. 80 (1943).

with federal funding for the education of handicapped children so long as the State has in effect a policy that assures all handicapped children the right to a free appropriate public education. 20 U.S.C. § 1412(1); *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 368 (1985); *Manecke v. School Board of Pinellas County, Florida*, 762 F.2d 912, 916-17 (11th Cir. 1985), *cert. den.*, 474 U.S. 1062 (1986). A "free appropriate public education" by definition includes "special education and related services." 20 U.S.C. § 1401(18); *Manecke*, 762 F.2d at 916. Federal regulations provide that if necessary to give a handicapped child special education and related services, the State must place that child in a public or private residential program at public expense. 34 C.F.R. § 300.302; *Manecke*, 762 F.2d at 917.

The three-year statute of limitations in North Carolina within which to bring a reimbursement suit based on the E.H.A. is found under N.C.G.S. § 1-52(2). However, as the district court properly found in this case, that statute was tolled by Karen's infancy and incompetency pursuant to N.C.G.S. § 1-17(a) which allows a person who is within the age of 18 at the time the cause of action accrues to bring suit within three years after the removal of the disability, in this case, upon reaching the age of majority. Thus, Karen's cause of action is not time barred as she timely filed after attaining her majority and having a guardian appointed. When a state statute is borrowed,

as here, the federal court will also borrow the state rules on tolling. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-486(1980).[2]

The district court, however, granted summary judgment in favor of the defendant. It found that Karen lacked standing because it was her parents who had suffered the monetary loss. The court found that Karen had not spent any of her own money on her education, nor could she show that she failed to receive an appropriate education because of Gaston County's refusal to reimburse her parents or the insurance company.

The argument of the Board with respect to the standing of Karen to bring suit is very narrow and rather curious.

The Board acknowledges that a "child who has reached majority and is not incapacitated can represent his own interest in claims not already barred by the statute of limitations." Brief p. 10, quoting from *Alexopulos*, 817 F.2d at 556. This is in accord with the reasoning of Vander Malle, to which we have previously referred, and which we follow, that both the parents and the child have a right to bring suits on account of default under the E.H.A.

The brief continues that "it may also be possible that a handicapped child without representation of a parent or guardian may have standing to sue in his own name." Brief p.10. This boils down to the

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2 The case of *Alexopulos v. San Francisco Unified School District*, 817 F.2d 551 (9th Cir. 1987), is to the contrary on the point that the statute of limitations is tolled in such cases. While that court recognized that state statutes of limitations, when borrowed, usually carry with them state tolling provisions, it found that the application of the tolling provision would be contrary to a federal policy that representatives of educationally handicapped children promptly assert the child's educational rights. We simply do not agree. We agree with the statement of the Second Circuit in *Vander Malle v. Amback*, 673 F.2d 49, 52 (2d Cir. 1982), that such a suit is properly maintained both by the child and its parents. That being true, the exercise of a state tolling provision in favor of the child should not deter the parents from bringing a suit at an earlier time.

contention that a child who is incapacitated by reason of a mental defect may not bring a suit such as this on his own behalf upon attaining majority, but a child who is not so incapacitated is able to prosecute his own claim. The logic of this argument simply escapes us, and we reject it without further discussion. Discriminating against a mentally incapacitated child was simply not within the contemplation of Congress, in our opinion.

This brings us to the last point in the case and the one upon which the district court rested its decision, that Karen was without standing: that she had no financial interest in the case.

While it is true that none of Karen's funds were used for her special education at the Brown Schools, the policy of insurance issued by Pilot Life and amended by Tultex was depleted in the amount of $64,198.22, and Karen's father paid $40,157.86 on the same account. Thus, the remaining insurance available for Karen was some $36,000 rather than the $100,000 policy limit provided for in the amended policy of self-insurance issued by Tultex.

It follows that if Karen had the right to demand of Tultex and Pilot Life reimbursement of any of her own funds which she might have expended on account of such special education, then she has standing in the financial sense to prosecute this suit under the E.H.A., for the E.H.A. provides that a child be furnished a "free, appropriate, public education" and the education furnished cannot be "free" if it diminishes the resources of the child, as here.

Fortunately, the law of North Carolina, which we apply in this case to determine Karen's standing in a financial sense, furnishes the answer to our problem.

Voqel v. Reed Supply Company, 177 S.E.2d 273, 277 N.C. 119 (1970), a case involving a third party beneficiary to a construction contract who was not in contractual privity with the party sought to be charged, adopted § 133 of the Restatement of Contracts. The Court said: "Restatement § 133 clearly states the law of this State and we, therefore, expressly approve the Restatement formula." 177 S.E.2d at 278. Restatement § 133 under the subject of Contractual Rights of Persons Not Party to the Contract, deals with the definition of donee, creditor, and incidental beneficiaries, which we abstract for the purpose of this opinion. If the purpose of the promisee in attaining the promise of performance is to make a gift of the performance to the beneficiary, then the beneficiary is a donee beneficiary. If the performance of the promise will satisfy an actual duty of the promisee to the beneficiary, then the beneficiary is a creditor beneficiary. If the beneficiary is neither a donee beneficiary nor a creditor beneficiary, then the beneficiary is an incidental beneficiary. So, third-party beneficiaries to contracts are classified by the Restatement into donee, creditor, and incidental.

Under Restatement of Contracts, § 136(1)(a), "[a] promise to discharge the promisee's duty creates a duty of the promisor to the creditor beneficiary to perform the promise."

Under § 133, Illustration 8 provides, "B promises A, for sufficient consideration, to furnish support for A's minor child, C, whom A is bound by law to support. C is a creditor beneficiary."

Since Shook was bound under North Carolina law to support his minor child, Karen, and since Pilot and Tultex promised Shook, for sufficient consideration, to pay the expenses for treatment of mental and nervous disorders such as those afforded at the Brown Schools and which were the obligation of Shook, it is apparent that under NorthCarolina law, as set out in the Restatement of Contracts, Karen would have had a right to sue Tultex and Pilot Life for any default in their obligations to her. We are, thus, of opinion that since Karen had

standing under North Carolina law to sue Tultex and Pilot Life on account of any default in their obligations under the policy, the diminution in the remaining amount of the policy was a financial interest of Karen's, and she, thus, had standing under Article 3 of the Constitution to prosecute her claim under the E.H.A.

The judgment of the district court is accordingly affirmed in part andvacated in part, and the case is remanded for action not inconsistent with this opinion.[3]

AFFIRMED IN PART,
VACATED IN PART, AND
REMANDED.

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3 Because this case fits within Illustration 8 of § 133 of the Restatement, we need not decide whether or not Karen was also a donee beneficiary. We also need not decide who may be an incidental beneficiary, only that Karen was not such. Consistent with our holding is the case of *Seals v. Loftis*, 614 F.Supp. 302 (E.D. Tenn., 1985), which held that the parents of handicapped children could sue for reimbursement of insurance proceeds used to pay an obligation which was a part of the free, appropriate, public education required by 20 U.S.C. § 1412(1). The only difference between Seals and this case is the question of who may be the plaintiff, which, as we have explained above, in our opinion is a matter of indifference.

Restatement of Contracts, 2d. was adopted in 1979 and rewrote § 133 as § 302, which reclassified beneficiaries from donee, creditor, and incidental to intended and incidental, but made no meaningful change which would affect us here. Accord: *Reidy v. Maculey*, 290 S.E.2d 746, 747 (N.C. App. 1982). Significantly, Illustration 2 to § 302 is the same as Illustration 8 to § 133.

It is also worthy of note that *Williston on Contracts*, 3rd ed., Jaeger, § 356, analyzes the problem in the same manner as does the Restatement, as has been noted by the North Carolina court in Vogel at p. 278.

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

No. C-C-86-555-M

Karen Leigh Shook, by and through her guardian ad litem, Wendy Shook,
Plaintiff,

vs.

Gaston County Board of Education,
Defendant,

vs.

State of North Carolina; The North Carolina State Board of Education,
Third Party Defendants.

Judgment Entered August 17, 1987

On December 8, 1986, Karen Leigh Shook, a mentally retarded and emotionally disturbed twenty-year-old woman, acting through her guardian ad litem, Janice Coulter, filed this suit against the Gaston County, North Carolina, Board of Education (Gaston County), seeking reimbursement of educational expenses pursuant to the Education of the Handicapped Act (EHA, 20 U.S.C. § 1400, et. seq.)

On February 25, 1987, a motion for summary judgment was filed on behalf of Gaston County, asserting that plaintiff's claim was barred by the statute of limitation.

On July 24, 1987, the court heard oral argument on the motion of Gaston County for summary judgment. The North Carolina State Board of Education, which had been brought into the suit as a third-party defendant by Gaston County, also joined in this motion. Federal Rule of Civil Procedure 56(c) permits the court to grant summary judgment only if the pleadings, depositions, interrogatory answers, admissions and affidavits show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The burden is on the moving party to make such a showing, and the court must assess the inferences from the facts asserted in the record in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

In order to understand the facts, it is first necessary to understand the statutory framework established by the EHA. The EHA provides public school districts with federal funding for the education of handicapped children so long as the state has in effect a policy that "assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1); B*urlington School Comm. v. Mass. Dept. of Ed.*, 471 U.S. 359, 368 (1985); *Manecke v. School Board of Pinellas County, Florida*, 762 F.2d 912, 916-17 (11th Cir. 1985). A "free appropriate public education" is defined as including "special education and related services." 20 U.S.C. § 1401(18); *Manecke v. School Board of Pinellas County, Florida, supra*, at 762 F.2d 916. Federal regulations provide that if necessary to give a handicapped child special education and related services, the state must place that child in a public or private residential program at public expense. 34 C.F.R. § 300.302; *Manecke v. School Board of Pinellas County, Florida, supra*, 762 F.2d at 917.

Plaintiff, through her guardian ad litem, alleges that in January, 1980, her doctors recommended that plaintiff be placed at the Brown Schools, a therapeutic residential center for special education in Austin, Texas; that both before and after placing plaintiff at

the Brown Schools, plaintiff's parents requested Gaston County to pay for this placement; that Gaston County refused to do so; and that $40,157.86 of the cost of plaintiff's special education at the Brown Schools was paid for by plaintiff's parents, and $64,198.22 was paid for by Pilot Life Insurance Company pursuant to an insurance policy of which plaintiff was a named beneficiary. Plaintiff asserts that under the decision of the United States Supreme Court in *Burlington School Comm. v. Mass. Dept. of Ed., supra*, 471 U.S. at 369, she is entitled to reimbursement of these moneys paid for her special education at the Brown Schools.

It is undisputed that by August, 1982, Gaston County officials had notified plaintiff's parents that Gaston County would not pay for plaintiff's educational program at the Brown Schools. Gaston County asserts that the applicable statute of limitations for action arising in North Carolina under the EHA is the three-year period for actions upon a federal statute provided by N.C.G.S. § 1-52(2). Gaston County further asserts that plaintiff's cause of action accrued no later than August, 1982, when plaintiff's parents were notified of the final decision by Gaston County not to pay for plaintiff's education at the Brown Schools. The complaint in this action was filed on December 8, 1986, which is more than three years from the time this cause of action accrued. Accordingly, Gaston County claims that this action is barred under the statute of limitations.

In response, plaintiff agrees that her action is governed by the three-year statute of limitations in N.C.G.S. § 1-52(2), and she does not dispute that the last action by the defendants entitling her to relief occurred in August, 1982. However, plaintiff asserts that the statute of limitations was tolled due to her minority and incompetency by N.C.G.S. § 1-17(a).

Plaintiff's assertion appears to be correct. North Carolina General Statutes § 1-17(a) tolls the running of the statute of limitations for persons who are under the age of 18 years or who are insane. The plaintiff had three years in which to file this suit after her

disability was removed, or after the appointment of a legal guardian. *Johnson v. Pilot Life Insurance Co.*, 217 N.C. 139 (1940). Plaintiff's guardian ad litem was appointed on July 9, 1984, and plaintiff was twenty years old when this suit was filed. She is not barred by the statute of limitations.

The question before this court, however, is whether plaintiff has standing to seek reimbursement from Gaston County of moneys paid for her special education by her parents and by Pilot Life Insurance Company. Although it is possible that plaintiff's parents and Pilot Life Insurance Company could have alleged injury under the EHA which, if shown, would have entitled them to reimbursement of plaintiff's educational expenses from Gaston County, *Burlington School Comm. v. Mass. Dept. of Ed.*, *supra*, at 471 U.S. 369, their claims are now barred by the statute of limitations. Plaintiff herself has suffered no damages. There is no allegation that plaintiff spent any of her own money on her education, or that plaintiff failed to receive an appropriate education because of Gaston County's refusal to reimburse her parents or Pilot Life Insurance Company.

Plaintiff's theory is that if plaintiff's parents and Pilot Life Insurance Company were now to receive these funds, the funds could be used to provide plaintiff with additional educational benefits. But how plaintiff's parents and Pilot Life Insurance Company may or may not spend money in the future is not relevant to whether plaintiff has suffered an injury in the past. *Alexopulos v. San Francisco Unified School Dist.*, 817 F.2d 551, 555 (9th Cir. 1987). Under these circumstances, plaintiff lacks standing to bring this reimbursement action.

This 14th day of August, 1987.

/s/ James B. McMillan
James B. McMillan
United States District Judge

APPENDIX C

DISTRICT COURT OF THE UNITED STATES
Western District of North Carolina

Charlotte Division
No. C-C-86-555-M

Karen Leigh Shook, by and through her guardian ad litem, Wendy Shook,
Plaintiff,

vs.

Gaston County Board of Education,
Defendant,

vs.

State of North Carolina; The North Carolina State Board of Education,
Third Party Defendants.

Judgment Entered August 17, 1987

Based on the considerations set out in the memorandum of decision filed on this day, IT IS ORDERED, ADJUDGED AND DECREED:

1. The motion of the defendants for summary judgment is allowed.

2. The action is dismissed.

This 14th day of August, 1987.
/s/ James B. McMillan
James B. McMillan
United States District Judge

APPENDIX D

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

No. C-C-86-555-M

Karen Leigh Shook, by and through her guardian ad litem, Wendy Shook,
Plaintiff,

vs.

Gaston County Board of Education,
Defendant,

vs.

State of North Carolina; The North Carolina State Board of Education,
Third Party Defendants.

Order Entered June 24, 1988

With continuing regret that I have no authority to do otherwise, IT IS ORDERED that plaintiff's motion to amend or alter the judgment, Docket 29, is DENIED.

This 24th day of June, 1988.

/s/ James B. McMillan
James B. McMillan
United States District Judge

(2)

Supreme Court, U.S.
FILED
JAN 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-775

In The

Supreme Court of the United States

October Term, 1989

GASTON COUNTY BOARD OF EDUCATION, THE STATE OF NORTH CAROLINA, AND THE NORTH CAROLINA STATE BOARD OF EDUCATION,

Petitioners,

v.

KAREN LEIGH SHOOK, BY AND THROUGH HER GUARDIAN AD LITEM, WENDY SHOOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in tolling the state's statute of limitations applicable to Respondent Karen Leigh Shook's claim?

2. Whether the Fourth Circuit erred in finding Karen Leigh Shook has standing to bring this action?

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No. 89-775

In The

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October Term, 1989

GASTON COUNTY BOARD OF EDUCATION, THE STATE OF NORTH CAROLINA, AND THE NORTH CAROLINA STATE BOARD OF EDUCATION,

Petitioners,

v.

KAREN LEIGH SHOOK, BY AND THROUGH HER GUARDIAN AD LITEM, WENDY SHOOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Respondent Karen Leigh Shook respectfully requests that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit be denied.

STATEMENT OF THE CASE

Respondent Karen Leigh Shook is a multiply-handicapped, incompetent adult. She is a specially-named, individual beneficiary under a group health insurance policy issued by Tultex Corporation and Pilot Life Insurance Company based on the employment of her father. Mr. Shook continues to be employed by the Tultex Corporation. Karen continues to be eligible to receive special therapeutic services under the terms of the group health insurance policy because at the time she became an adult she continued to be disabled by reason of mental retardation.

The separate group insurance benefit provided directly to Karen is a rare, even unique situation. At the time that the Tultex Corporation offered a position to Karen's father, they reached a special agreement that Tultex, through Pilot Life Insurance Company, would self-insure Karen, individually, to provide an available lifetime benefit for special therapeutic services relating to mental and nervous disorders. Petition App. at 3A. As found by the circuit court, Karen was specifically named in documents creating this agreement between the employer and her father.

Prior to February 1980, Karen attended the public schools in North Carolina, including the schools operated by Petitioner Gaston County Board of Education. In February 1980, following her severe behavioral breakdown and an extended inpatient psychiatric hospitalization, Karen's parents placed Karen at The Brown Schools in Austin, Texas, where she received a highly structured educational residential program.

Shortly after Karen's entry into the Brown Schools program, Karen's parents made demand that free appropriate residential education be provided for her by Petitioner Gaston County Board of Education, the local educational agency ("LEA"). From February 1980 through September 1982, the insurance policy payments for Karen's attendance at The Brown Schools depleted more than $64,000.00 from her available lifetime reserve coverage under the policy which was a maximum $100,000.00. Karen's father separately paid over $40,000.00 on the same account. Petition App. at 6A.

Karen's parents retained attorney James C. Fuller to represent them in seeking an appropriate educational program for Karen from the LEA. Mr. Fuller's affidavit of record shows that he only represented Karen's parents, and never was authorized nor sought to represent Karen.[1] The parents never asserted the separate pecuniary losses of their daughter as a ground for complaint. Eventually, Mr. and Mrs. Shook chose not to pursue an administrative hearing to resolve their own disputes with the Petitioner LEA.

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[1] Petitioners contend that during the time in which the parents and the LEA contested the appropriate education and placement of Karen "The County Board and its counsel received no further communications from *Ms. Shook* her parents or *attorneys* until 1986 . . . " (Petition at 8) (emphasis added). Karen was incapable of communicating with the County Board and the implication that Karen herself was represented by counsel before this action was filed is contradicted by the record.

Karen attained the age of majority (18) on February 9, 1984. On July 9, 1984, Karen was declared legally incompetent in a state court proceeding and became the ward of a court-appointed guardian. This action was filed by Karen, appearing through a guardian *ad litem*, on December 8, 1986, alleging a claim for relief under the Education for All Handicapped Children Act ("EAHCA"), 20 U.S.C. 1406-1461. Respondent alleged that she was entitled to recover reimbursement for the depletion of insurance benefits available to her under the insurance policy as an intended third-party beneficiary. Respondent alleged that the LEA had failed to provide appropriate special educational services and that Karen's insurance coverage reserve had been depleted in the acquisition of appropriate private special educational services at The Brown Schools. The ultimate factual issues underlying this claim have yet to reach adjudication at any stage of the proceedings below, although Petitioners represent to this Court numerous factual statements which are without basis in the record below.

The LEA filed a motion for summary judgment contending that a three-year statute of limitations barred Karen's claim.

The district court rejected the LEA's contention that Karen's claim was barred by the statute of limitations. Petition App. at 11A. However, the district court granted summary judgment to the LEA based on its decision that Respondent lacked standing to bring the reimbursement action, concluding that "Plaintiff herself has suffered no damages." Petition App. at 12A. Respondent's motion to alter or amend the judgment was denied by the district

court "with continuing regret that [it had] no authority to do otherwise." Petition App. at 14A.

The Respondent appealed the district court's decision. Neither the LEA nor the third party defendants, Petitioners State of North Carolina and North Carolina State Board of Education[2], cross-appealed the district court's decision on tolling.[3] The Court of Appeals affirmed the district court holding regarding tolling of the statute of limitations, vacated the district court decision regarding Karen's standing to litigate the claim, and remanded the action to the district court for trial.

REASONS FOR DENYING THE WRIT

Petitioners overstate the import of this case in several ways. First, Petitioners assert that the Fourth Circuit Court of Appeals' decision to apply state law tolling the statute of limitations as to Respondent's claim conflicts with a decision in the Ninth Circuit Court of Appeals. Second, Petitioners assert error in the circuit court decision, contending that tolling of the limitations period imported from state law into EAHCA contravenes federal

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[2] At the time of the appeal to the circuit court, the third party defendants gave notice that they would not be parties of record on appeal. Yet, the third party defendants now are joined with the third party plaintiffs as petitioners for writ of certiorari.

[3] The LEA argued to the circuit court that it should affirm the district court judgment, even though there may be standing, because the statute of limitations had run. Petition App. at 3A, n. 1.

policy expressed in EAHCA. In a related argument, Petitioners claim that applying tolling rules to state limitations law in EAHCA cases will create hardships for public educational agencies in the administration of the EAHCA. Further, Petitioners assert error in the decision below regarding Karen's standing to bring the action.

A writ of certiorari is not warranted in this case. The alleged conflict between the two circuits can be reconciled by the distinguishable facts of the cases. In the EAHCA, Congress by its silence has left to the states the task of setting time limits for bringing an action. Congress could have explicitly provided a limitations period if the general concept of tolling during legal disability was so clearly in opposition to the policy underlying EAHCA. Courts have agreed that the EAHCA must be interpreted broadly to cover all handicapped children and their unique needs. So too must the broad application of state limits and tolling rules be applied to protect the rights of children under the EAHCA. The Ninth Circuit decision upon which the Petitioners rely is in error in its interpretation of federal policy, and in error in its resolution of the issue of tolling of the statute of limitations.

The *in horrorem* arguments of the Petitioners are similarly feeble. There has been no showing that application of tolling rules will be difficult or burdensome to apply. There is a well established, simple procedure for ensuring the protection of the handicapped child's separate pecuniary interests in those few cases in which the issue may arise.

The decision below was correct on the issue of standing, as well. Karen Shook had a separate property interest

in the insurance benefits. That property interest was depleted in order for her to receive an appropriate education at private expense. That insurance fund still would be available to her today, but for the failure of the LEA to provide an appropriate program at public expense. Karen plainly is within the class of persons to whom the EAHCA provides protection. Thus, Respondent has alleged injury in fact and an injury within the zone of interests of the statute under which she proceeds. Respondent's complaint should not be dismissed under prevailing standing jurisprudence.

Finally, this case does not reach the requisite level of importance to justify certiorari because the issues so rarely arise, and affect only a few cases and a relatively small number of handicapped children.

I. CONFLICT BETWEEN CIRCUITS DOES NOT WARRANT THE GRANTING OF THE PETITION IN THIS CASE.

The Petitioners suggest a conflict in the decision of the Fourth Circuit, in this case, and the decision of the Ninth Circuit in *Alexopulos v. San Francisco Unified School District*, 817 F.2d 551 (9th Cir. 1987). In *Alexopulos*, the Ninth Circuit held that borrowing the California tolling rule under the state statute of limitations would undercut federal policy favoring resolution of disputes under EAHCA at the earliest time possible. *Alexopulos, supra*, 817 F.2d at 555-556. In the present action, the Fourth Circuit held that application of the North Carolina tolling rule to a claim for reimbursement of private educational

expenses would not be inconsistent with the federal policy underlying that cause of action. Petition App. at 4a.

The apparent conflict can be reconciled, without the issuance of this Court's writ, by close reading of distinguishable facts in these two cases. In *Alexopulos*, the action was brought on behalf of the handicapped child by his mother, alleging claims under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, and under EAHCA. *Id.*, at 554-555. The plaintiff parent presented a claim for reimbursement of her past private educational expenses incurred in 1974 and 1975, but only alleged the reimbursement claim under Section 504. *Id.* Mrs. Alexopulos alleged a separate claim under the EAHCA, for compensatory education, claiming that the school district's procedural violations in 1979 had resulted in her son's exclusion from school. *Id.* at 555. Significantly, Mrs. Alexopulos *"concede[d] that Alexis [the handicapped child] spent no money of his own on his education."* *Id.* Thus, in the Ninth Circuit case, the EAHCA claim involved no allegation of a loss or depletion of the separate financial resources of the handicapped child.

In the present case, the EAHCA claim is based solely on the allegation that Karen's own financial resources were depleted. Her claim is, not that she lost time in school, but that she lost money paying for private special education which should have been provided free by the public educational agency. The nature of the claim being asserted can, and should, make a difference for purposes of applying federal policy to determine the propriety of importing into the federal statute a tolling provision created by state law. The provision of education for a child traditionally is within the common law authority and

duty of the parents. *Burge v. City and County of San Francisco*, 41 Cal. 2d 608, 262 P.2d 6 (1953); 3 R. Lee, *North Carolina Family Law* 187 (Michie 1981). Disposition of the separate property, or waiver of claims of a child, however, are not within the natural common-law rights of parents. *Burge, supra; Sell v. Hotchkiss*, 264 N.C. 185, 141 S.E.2d 259 (1965). North Carolina law requires court approval and supervision of parents acting on behalf of their child when the issues involve the child's financial interests or property. *Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281 (4th Cir. 1979). North Carolina law does not require court supervision of parents acting on behalf of their child when the issue is the quality and quantity of services to be provided to the child by an educational agency.

The nature of the claim asserted by Mrs. Alexopulos was for compensation for education not provided. At the time the claim arose, Mrs. Alexopulos had both the authority and duty at California common law to assert and defend her child's entitlement to special educational services. As the *Alexopulos* court noted, Congress undoubtedly intended to encourage prompt resolution of disputes regarding the affirmative, prospective provision of educational services to handicapped children. Nothing in this goal of the EAHCA would require an alteration of the well-established relationship between parent and child, with regard to the actual provision of educational services to the child.

However, Karen's claim under EAHCA never has been for the replacement of services which were denied her. Karen's claim is for reimbursement of the financial

costs she individually suffered to obtain appropriate private educational services. Karen's claim is related to, but distinct from, any claim her parents were able to assert on her behalf for the provision to her of appropriate education. In contrast, Mrs. Alexopulos' claim, and her son's claim, for compensatory educational services, are identical. For both of them, the claim arises directly from the denial of any educational services, as to which Mrs. Alexopulos was the natural guardian of her child at the time the claim accrued. However, at the time Karen's claim accrued, her parents had no legal authority to waive, release or compromise her contract rights to insurance benefits, or her right under EAHCA to be paid reimbursement for those lost benefits. *Genesco Inc. v. Cone Mills Corp., supra.* With regard to the particular claim being advanced here, Karen was without legal representation. The *Alexopulos* court specifically noted:

> We do not decide whether the statute tolls for a child without representation (for example, when a school district does not appoint a surrogate as required by 20 U.S.C. 1415(b)(1)(B).

Alexopulos, supra, at 556, n. 7. Under North Carolina state law, Karen was not legally represented with regard to claims concerning her separate property. To read into the statute a federal policy requiring the parents to assert such an action on behalf of their child, at risk of the child's claim being extinguished, does work an implicit preemption of state law governing the relationship between parent and child.

This case is factually unique when compared with *Alexopulos.* Karen Shook was identified individually as a special third-party beneficiary under a group insurance

policy, arranged between her father and his employer. That beneficial interest was lost to Karen because she was forced to procure private educational services which the Petitioner LEA would not provide. While in *Alexopulos* it was conceded that the handicapped child suffered no personal financial loss, in the present action the essence of Respondent's claim is her own personal financial loss. Thus, the Fourth Circuit and the Ninth Circuit were not presented with the same cause of action, and the opinions in the two circuit courts therefore are not in true conflict.

II. THE FOURTH CIRCUIT DID NOT ERR IN REVERSING THE DECISION OF THE DISTRICT COURT.

A. The Fourth Circuit Addressed The Policy Underlying The EAHCA And The Rule Of Tolling.

Petitioners contend that the borrowing of North Carolina's statute of limitations, and the use of its rule for tolling the period of limitations, are inconsistent with federal policy underlying the EAHCA. Petitioners assert that the Court of Appeals ignored the precedent of *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). Petition at 9. Petitioners further assert that the policy behind the EAHCA was not even discussed by the circuit court in its decision below. *Id.*

The primary issue before the circuit court was that of standing. Yet, contrary to Petitioners' assertion, the Fourth Circuit addressed the issue of tolling, and the underlying policy of the EAHCA, in a footnote in its

decision. Petition App. at 5A, n. 2. The circuit court declared that the importation of the state tolling provision into EAHCA is not contrary to federal policy and followed the Second Circuit in *Vander Malle v. Ambach,* 673 F.2d 49, 52 (2d Cir. 1982)

> . . . Such a suit is properly maintained both by the child and its parents. That being true, the exercise of a state tolling provision in favor of the child should not deter the parents from bringing a suit at an earlier time. *Id.*

B. The Policies Underlying North Carolina's Tolling Statute And The EAHCA Are Consistent.

The policy underlying North Carolina's tolling statute is consistent with the policy underlying the EAHCA. Each law is written to protect children. Each law presumes that the child lacks capacity to act in his or her own behalf. Again, North Carolina law requires court approval and supervision of parents acting on behalf of their child when the issues involve the child's separate financial interests or property. *Genesco, Inc. v. Cone Mills Corp., supra.*

However, EAHCA does not draw a distinction between the child's financial interests and the child's personal interests in appropriate education. Congress understood that financial disputes with public educational agencies might arise in cases involving residential programs. *See, Burlington School Committee v. Department of Education,* 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). Congress did not specifically foresee the possibility that the financial loss might be borne by the child's separate estate, not by the parents. Thus, unlike state

limitations law, EAHCA makes no specific provision for protection of the separate pecuniary interest of the child. This statutory lacuna has been filled, in the present action, by the application of the tolling rule which protects the separate interest of the child during minority. Failure to toll the statute of limitations in the present case fundamentally alters the legal relationship between parent and child, a matter traditionally left to the states to govern. As Petitioners would have it, parents would have the authority under EAHCA to pursue or not pursue, waive or compromise their child's separate property interest for reimbursement of educational expenses incurred by the child.

Further, failure to toll the limitations period during the infancy of the child, in cases in which the child has a separate legal claim, fundamentally alters the state limitations law itself.

> [Cases such as *Tomanio*] are best explained not by 42 U.S.C. 1988 . . . but by the inseparability of the time period itself from some (though not necessarily all) other provisions of a state's limitations law. [Citation omitted] The actual generosity of a statute of limitations depends not only on the nominal period within which suit must be brought but on provisions allowing that period to be extended for various reasons, so that if the federal court borrows just the period it may in fact be giving plaintiffs more or less time than the state that enacted the borrowed statute would have thought appropriate in the circumstances.
>
> . . .
>
> Doctrines such as laches, tolling and estoppel affect the length of time available to sue. They

> are integral to the complex of rules that makes up the entire period of limitations – "period", not "statute", being the key to understanding.

Lewellen v. Morley, 875 F.2d 118, 120-121 (7th Cir. 1989). Thus, while overriding federal policy might persuade a federal court to reject the adoption of state tolling provisions while absorbing the state's general limitations period in a federal statute, the federal policy ought to be sufficiently clear and applicable to the facts of the case to justify what amounts to a permutation of the actual limitations period.

The *Alexopulos* court assumed the federal policy underlying EAHCA to be "to assure appropriate education for handicapped children at the earliest time possible. Failure to act promptly could irretrievably impair a child's education." *Alexopulos, supra*, 817 F.2d at 556. Again, the Ninth Circuit had before it a case in which the issue was the alleged exclusion of the child from all educational services. Under such circumstances, the potential for irretrievable loss of educational opportunity is manifest, and a policy of swift pursuit of EAHCA remedies could be deemed overriding. In the present action, and in every reimbursement action under EAHCA, *see, e.g., Burlington School Committee, supra*, the nature of the claim always is that the child *has* received appropriate educational services and *has* avoided irretrievable impairment of educational progress – at private expense. Therefore, in reimbursement claims, the criticality of assuring the prompt provision of appropriate services to the child is diminished, and the need for prompt resolution of the complaint should be weighed against other competing interests.

In the present action, the competing interest is the protection of the child's separate property rights. The *Alexopulos* court, while advertent to the right of the parent to pursue a reimbursement action for private educational expense, *see*, 817 F.2d at 556, n. 6, was not faced with and did not recognize the possibility presented by the case at bar: the child may be the person who pays for the private education. This circumstance arises not only in the context of a beneficiary interest under an insurance contract, as here, but also in the case where the child is the owner of money or property or the beneficiary of a trust. The Fourth Circuit correctly recognized the child's separate interest in this case, and noted that application of the tolling rule in this particular case should not deter parents in the usual EAHCA case from promptly pursuing programmatic and placement issues with the school system, which is the traditional role of parents. As this Court has noted, "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Board of Education v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 3050, 73 L. Ed. 2d 690 (1982). Thus, the Fourth Circuit has correctly reconciled the policy interests expressed by the EAHCA and the state statute of limitations.

C. Petitioners Confuse the Issues of Tolling and Standing.

Petitioners seem to assert that the standing issue as decided below also represents a conflict with the decision in *Alexopulos*, raising the need for the grant of certiorari. Again, it is quite clear upon examination of the two cases

that the facts before the Ninth Circuit were that no personal loss of funds or property of the child was alleged. The decision of the Fourth Circuit represents a careful appraisal of Karen Shook's claim of injury to her own property. The court below determined that principles of North Carolina law, applied to the facts of record, characterized Karen as an intended beneficiary of the insurance contract between her father and his employer. Petition App. at 6A-8A. On this basis, the Fourth Circuit concluded that Karen had alleged the requisite personal stake in the outcome of the litigation to confer upon her the standing to bring the action in her own name. The two cases are factually distinguishable and, thus, to the extent that the *Alexopulos* decision addresses standing (which is not readily apparent from that opinion), there clearly is no conflict.

Petitioners also assert that this court in *Burlington School Committee, supra,* explicitly approved a reimbursement remedy only to parents, and claim that the child never can be a proper plaintiff in a reimbursement action. This argument misses the mark for the simple reason that this Court was not called upon in *Burlington School Committee* to consider the issue of the child's right to reimbursement. The *Burlington School Committee* case arose solely from the parents' claim to reimbursement on the facts of that case. To infer from the Court's pronouncement – that parents may sue for reimbursement – that children may not sue for reimbursement is an obvious logical fallacy. The Petitioners advance, in this Court, the strained semantic theory that, because this Court said "parents can sue," this Court meant "only parents can sue." Except

for the necessity imposed by the Petition, serious response to such obtuse literalism would not be required.

It is plain from the language of the Act that children are entitled to bring actions under EAHCA. The rights conferred by the Act are conferred upon the handicapped child. 20 U.S.C. 1400(c); 20 U.S.C. 1401(a)(16); 20 U.S.C. 1412(1); 20 U.S.C. 1415(a). While the procedural safeguards specifically allow parents or guardians certain procedural rights, the procedural safeguards are guaranteed to "handicapped children and their parents." 20 U.S.C. 1415(a). The Act requires that procedural protections "shall include, but shall not be limited to" the opportunity for parents to present complaints. The right to appeal administrative decisions into federal or state court is conferred upon "any party aggrieved by the findings and decision." 20 U.S.C. 1415(e)(2).

Thus, Petitioners' arguments concerning Karen's standing were properly rejected by the circuit court. Petitioners, in order to bolster their position, attempt to argue in this Court facts which are matters for trial. Whether or not the insurance policy provided only for treatment of mental and nervous disorders, providing no coverage for educational expenses, does not raise a clear basis for the denial of Karen's reimbursement claim. There are therapeutic services which may be covered for health insurance purposes and still be the responsibility of the public educational agencies within the meaning of EAHCA. *See, Massachusetts v. Secretary of HHS*, 816 F.2d 796 (1st Cir. 1987), *affirmed in part, reversed in part on other grounds, Bowen v. State of Massachusetts*, 487 U.S. ___, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988) (school personnel's training of mentally retarded persons in such skills as dressing

and feeding oneself are reimbursable rehabilitative services for purposes of Medicaid program).

III. THE QUESTIONS PRESENTED DO NOT WARRANT A GRANT OF CERTIORARI BECAUSE OF THEIR LIMITED IMPORTANCE.

The grant of a writ of certiorari is purely discretionary, *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975), and is granted only when important issues of federal law are presented and warrant resolution by this court. Rule 17, U.S. Sup. Ct. Rules. *See, U.S. v. Oregon*, 366 U.S. 643, 645, 81 S. Ct. 1278, 6 L. Ed. 2d 575 (1961); *Pennsylvania v. Nelson*, 350 U.S. 497, 499, 76 S. Ct. 477, 100 L. Ed. 640 (1956); and *Rice v. Sioux City Mem. Parks Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955). The issues presented by Petitioners do not rise to the level of importance which would dictate issuance of the writ of certiorari. There are few situations in which the decision below will have any impact. Other than the opinion below and *Alexopulos*, the tolling provision applicable to a statute of limitations under EAHCA has been mentioned in only one other reported case, and then only indirectly. *Gerasimou by Gerasimou v. Ambach*, 636 F. Supp. 1504 (E.D.N.Y. 1986). In the fifteen years since the enactment of the EAHCA there has been little litigation over the issue of a handicapped student having standing to sue under the EAHCA. There has been even less litigation over the tolling of a limitations statute. There is good reason for this. The issue, when it arises, is rarely a financial one, and even rarer still when the finances in question are the handicapped student's own resources.

Therefore the questions raised by the Petition have little practical impact on a national basis.

Petitioners also raise the specter of a burdensome process which educational agencies would have to pursue to ensure the prompt extinguishment of independent claims of handicapped students. As noted, separate representation of the child's interest can only be an issue in one narrow context: when the facts show that private educational services have been purchased with the child's own funds. What must the State and local educational agencies do to ensure that this claim is properly advanced? Simply, they must determine whether the handicapped child has been receiving private educational services, and they must determine the source of payment for those private educational services. This inquiry can be informal, but in North Carolina the agencies affected will have the opportunity in every due-process hearing to engage in formal discovery of the sort provided by the federal Rules of Civil Procedure. This is so because the administrative hearings required under EAHCA now are conducted in North Carolina by administrative law judges under the state Administrative Procedure Act. The North Carolina Office of Administrative Hearings has adopted procedural rules which include "any means of discovery available pursuant to the North Carolina Rules of Civil Procedure, G.S. 1A-1." Title 26, N. C. Administrative Code, Ch. 3, Section .0012.

If, through informal inquiry or in discovery in a contested case under the Act, the LEA learns that a separate property interest of the handicapped child is implicated, the LEA need only apply for the appointment by the ALJ of a guardian *ad litem* for the child. Rule 17 of the

Rules of Civil Procedure applies in these hearings under North Carolina law. *See*, Title 26, N. C. Admin. Code, Ch. 3, Sec. .0001. In short, Petitioner State of North Carolina has in place a simple, commonly accepted means of ensuring that a handicapped child's separate claims are properly represented in those few cases in which the issue might arise. The process is no more burdensome nor mysterious than that required in any other civil litigation in which a child's interests may differ from or be legally unrepresented by the interests of the parents. Thus, the Petitioners are suggesting, as grounds for issuance of the writ, a theoretical problem which does not in fact exist.

The Petitioners contend that decisions of public school systems, deliberately and knowingly left unchallenged by the child's parents at the time, should not remain grounds for litigating years later. Respondent agrees. Respondent asserts that such is not the case before this court. The rare, even unique claim by Karen for her own financial reimbursement is the basis of her standing to litigate many years later. Karen's separate financial interest never was asserted by her parents, and under state law could not have been effectively asserted by her parents. Regardless of the intention of the child's parents concerning litigating issues of educational program and placement, the primary consideration of the school system should be in protecting whatever interest the child may have individually at the time that the issue arises. The civil procedures for achieving this goal are within easy reach of the Petitioners.

CONCLUSION

For the foregoing reasons, the Respondent, Karen Leigh Shook, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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